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No. 84-1518

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRI-STATE MOTOR TRANSIT CO., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners challenge the validity of the Interstate Commerce Commission's revised policy for licensing rail-affiliated motor carriers, which, in light of recent statutory amendments and changed conditions in the industry, no longer requires a showing of "special circumstances" in order for the carrier to obtain unrestricted motor carrier operating authority. The petition has no merit. The court of appeals lacked jurisdiction over this challenge to the validity of an agency rule because the petition for review was filed outside the 60-day period prescribed in the Hobbs Act, 28 U.S.C. 2344. Moreover, the policy at issue here was previously upheld by the Fifth Circuit, *American Trucking Ass'ns* v. *ICC*, 722 F.2d 1243 (1984), and this Court denied a virtually identical petition for a writ of certiorari, No. 83-2117 (Oct. 29, 1984). The present duplicative effort to obtain review should similarly be denied.

1. In January 1983, the ICC issued a final policy statement in Ex parte No. MC-156, *Motor Carrier Operating Authority-Railroads,* 132 M.C.C. 978 (served Jan. 6, 1983), abolishing the so-called "special circumstances" doctrine in the licensing of rail-affiliated motor carriers.[1] The American Trucking Associations, Inc. (ATA) (and several of its affiliated conferences and associations), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) sought review of the ICC's decision in the United States Court of Appeals for the Fifth Circuit. On January 20, 1984, the court of appeals affirmed the ICC's decision in all respects. *American Trucking Ass'ns* v. *ICC,* 722 F.2d 1243 (5th Cir.). The ATA and the Teamsters filed a petition for a writ of certiorari that was denied by this Court. No. 83-2117 (Oct. 29, 1984).

While the Fifth Circuit was considering the challenge to the agency's policy statement, the Denver & Rio Grande Western Railroad Company (D&RGW), a rail carrier, filed

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[1]The "special circumstances" doctrine was a longstanding exception to the national policy to protect motor carriers from encroachment by railroads. Under that exception, the ICC could grant to a railroad unrestricted motor carrier operating authority if it was shown that (1) the grant would not restrain competition, and (2) the public interest required the proposed service which existing carriers had not offered except where it suited their convenience. See *American Trucking Ass'ns* v. *United States,* 364 U.S. 1 (1960).

Following enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.,* and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.,* which loosened regulatory strictures on the trucking and rail industries, the ICC opened a rulemaking proceeding to reevaluate its policies governing rail-motor operating rights. After rulemaking procedures allowing full public participation (in which the American Trucking Associations, Inc. (ATA) and Teamsters fully participated) the Commission announced that it would no longer require a showing of "special circumstances" for a rail-affiliated motor carrier, or a railroad, to obtain unrestricted motor carrier operating authority in a motor carrier licensing proceeding. Ex parte No. MC-156.

an application for a motor carrier license pursuant to the Ex parte No. MC-156 policy. Only one motor carrier, Tri-State Motor Transit Co. (Tri-State), opposed D&RGW's application. A Commission employee review board, relying upon the new Ex parte No. MC-156 policy, granted the application in a decision styled *The Denver & R. G. W.R.R.*, I.C.C. Docket No. MC-166474 (Sub-No. 1) (Aug. 26, 1983) (Pet. App. 9a-13a). The ATA and the Teamsters then sought to intervene in an appeal to the full Commission to assert that D&RGW's application should have been denied because the ICC's new policy was invalid. The Commission affirmed the review board (Pet. App. 14a-18a) and refused to entertain the ATA's and the Teamsters' arguments, noting that those parties merely sought to relitigate the validity of Ex parte No. MC-156, which was then under consideration by the Fifth Circuit (Pet. App. 15a). The ATA, the Teamsters, and Tri-State then petitioned for review under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, in the Eighth Circuit, some 11 months after the Ex parte No. MC-156 rule had been issued. The only substantive issue raised was the validity of ICC's abolition of the special circumstances doctrine — the same question then pending before the Fifth Circuit.[2]

Prior to the filing of briefs in the Eighth Circuit, the Fifth Circuit affirmed Ex parte No. MC-156. *American Trucking Ass'ns* v. *ICC, supra.* The Commission and the United States then argued in the Eighth Circuit that the court lacked jurisdiction to review the substantive validity of the Ex parte No. MC-156 policy because the Hobbs Act limits a court's jurisdiction to petitions filed within 60 days of the issuance of an ICC order, and because the Fifth Circuit had

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[2]The ATA and the Teamsters also challenged the ICC's denial of their petition to intervene in the D&RGW administrative proceedings.

exclusive jurisdiction to review the validity of the ICC policy.[3]

The court of appeals rejected (Pet. App. 6a) petitioners' arguments that the Commission had acted improperly in abolishing the special circumstances doctrine, noting (Pet. App. 7a):[4]

> We therefore agree with the ICC and the Fifth Circuit *ATA* decision * * * that the showing required under the special circumstances doctrine of compelling necessity for unrestricted authority for rail-affiliated motor carriers has no place in the pro-competitive licensing regulations of the revised Interstate Commerce Act.

The court of appeals proceeded to affirm the issuance of D&RGW's operating license.

2. For the reasons stated in the government's petition for a writ of certiorari in this case, No. 84-1515 (filed Mar. 25, 1985), the lower court lacked jurisdiction to consider petitioners' attempt to relitigate the validity of the special circumstances doctrine. If we are correct, it follows that this Court, too, lacks jurisdiction to consider petitioners' challenge to the lower court's decision, which entertained an attack on an ICC decision more than 60 days after the issuance of that decision, contrary to the Hobbs Act, 28 U.S.C. 2341 *et seq.*

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[3]The government also argued that petitioners were collaterally estopped from challenging the merits of the Commission's new policy in the guise of a challenge to the D&RGW licensing proceeding because the very same petitioners had previously, and unsuccessfully, challenged the policy in another court.

[4]The court of appeals reached the merits after rejecting the government's jurisdictional arguments. Those jurisdictional rulings are the subject of the government's petition for a writ of certiorari in No. 84-1515 (filed Mar. 25, 1985).

3. In any event, the instant petition by the ATA, the Teamsters, and Tri-State need not detain this Court for long, as it merely repeats, largely verbatim, the same parties[5] earlier petition for a writ of certiorari to the Fifth Circuit in *American Trucking*. *Compare* the petition in this case, No. 84-1518, *with* the petition and reply brief in No. 83-2117. Petitioners' contentions are no more deserving of review by this Court now — after they have been rejected by two courts of appeals — than they were last October.

Indeed, rather than demonstrating any basis for review on the merits, the instant petition instead illustrates the error of the lower court's jurisdictional ruling that we challenge in No. 84-1515. Here, petitioners are for a second time bringing before this Court the validity of the ICC's abolition of the special circumstances doctrine (see Pet. 3 ("The correctness of that holding [in Ex parte No. MC-156] is the issue presented by this case.")) — a matter that this Court has already declined to consider.

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 84-1518 should be denied.

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APRIL 1985

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[5]While Tri-State was not a petitioner in the Fifth Circuit and previous certiorari litigation, as a member of the ATA, Tri-State should also be barred from relitigation of the issue. See Pet. App. 2a n.1, citing *Western Coal Traffic League* v. *ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

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